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# A Progressive State of Mind: New York's Opportunity To Reclaim Justice For Its Juveniles

Julianne T. Scarpino

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**A PROGRESSIVE STATE OF MIND:  
NEW YORK'S OPPORTUNITY TO RECLAIM  
JUSTICE FOR ITS JUVENILES**

*Julianne T. Scarpino\**

*Though New York State was once progressive in its approach to juvenile justice, it is now one of only two states clinging to an archaic age of criminal responsibility: sixteen years old. In addition, New York's thirteen-, fourteen-, and fifteen-year-olds are prosecuted as adults if they commit designated felonies. Adult prosecution and incarceration of juveniles harms both the child and society. Recent developments in brain imaging demonstrate that juveniles are both less culpable than adults and more receptive to rehabilitative intervention. In New York, this opportunity to rehabilitate is squandered. Juveniles incarcerated in adult facilities have limited access to educational and rehabilitative programs and are at high risk for sexual victimization, depression, and criminal socialization. Moreover, empirical studies of juveniles sentenced as adults conclude that adult sentencing has no deterrent effect on juvenile crime. Proposed legislation, the youth court pilot program, and recommendations from the Governor's Commission are progressive steps to dismantling New York's outdated juvenile justice system, but they fall short by denying assistance to New*

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\* J.D. Candidate, Brooklyn Law School, 2016. B.A. in Political Science, Wake Forest University, 2009. Thank you to my parents, the Hon. Anthony A. Scarpino, Jr. and Eleanor Scarpino, for nurturing my love of academia and the law. Thank you to my family and friends for their encouragement and generosity. Thank you to Jeffrey Gnerre for his endless patience. Thank you to Professor Cynthia Godsoe for her thoughtful revisions and Professor Adam Kolber for igniting my research. Thank you to the *Journal of Law and Policy* for their insightful comments and careful edits.

*York's most troubled juveniles. This Note advocates four changes to the New York criminal justice system. First, the age of criminal responsibility in New York should be raised to eighteen. Second, New York should establish a separate youth court to adjudicate all cases involving sixteen- and seventeen-year-olds, and all designated felonies committed by thirteen-, fourteen-, and fifteen-year-olds. Third, New York should eliminate any provisions permitting the transfer of juveniles from family court to adult criminal court. Fourth, district attorneys and judges should have discretion to authorize waiver from criminal court to youth court for select cases involving eighteen- to twenty-one-year-olds. It is time for New York to raise the age of criminal responsibility and embrace rehabilitative intervention for all juveniles, regardless of the offense.*

#### INTRODUCTION

*"There is no denying the fact that we cannot write these children off forever. Some day they will grow up and at some point they will have to be freed from incarceration . . . and the kind of society we have in the years to come will in no small measure depend upon our treatment of them now."*<sup>1</sup>

Rikers Island is situated in the middle of the East River—out of sight, mind, and earshot of most New Yorkers.<sup>2</sup> Though its inmates are generally unseen and unheard, former teen inmate Ismael Nazario can confirm that the juveniles incarcerated at Rikers and the screams they bellow from their cells are quite real.<sup>3</sup> Rikers is a

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<sup>1</sup> Rose M. Charles & Jennifer V. Zuccarelli, Note, *Serving No "Purpose": The Double-Edged Sword of New York's Juvenile Offender Law*, 12 ST. JOHN'S J. LEGAL COMM. 721, 743 (1997) (quoting *United States v. Bland*, 472 F.2d 1329, 1349 (D.C. Cir. 1972) (Wright, J., dissenting)).

<sup>2</sup> See *Culture of Violence Pervades Rikers' Juvenile Facilities* (National Public Radio Oct. 15, 2014), transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=356165968>.

<sup>3</sup> Amelia Pang, *This is New York: Gabrielle Horowitz-Prisco, Director of Juvenile Justice Project on Protecting Children*, EPOCH TIMES (Aug. 30, 2014),

city jail for *adult* inmates, and the majority of its prisoners are kept there pending the resolution of their cases.<sup>4</sup> In New York, however, the term “adult” can be misleading. New York is one of only two states<sup>5</sup> that automatically prosecute sixteen- and seventeen-year-olds as adults, and adult criminal court retains original jurisdiction over juveniles as young as thirteen who commit designated felony acts.<sup>6</sup>

At age sixteen, Ismael was arrested for assault and incarcerated at Rikers pending the resolution of his criminal case.<sup>7</sup> Most often, the source of Ismael’s and his fellow inmates’ agony was their time in solitary confinement<sup>8</sup>—a form of isolated imprisonment where the inmate spends twenty-three hours per day in a six-by-eight foot cell and one hour per day in a cage outdoors.<sup>9</sup> While incarcerated, Ismael spent more than 300 days in solitary confinement.<sup>10</sup> Ismael, reflecting on his time at Rikers, recalled the screams of fellow inmates and the times he lent his voice to their

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<http://www.theepochtimes.com/n3/923273-this-is-new-york-gabrielle-horowitz-prisco-director-of-juvenile-justice-project-on-protecting-children/print.php>.

<sup>4</sup> See Trey Bundy, *For Teens at Rikers Island Solitary Confinement Pushes Mental Limits*, CTR. FOR INVESTIGATIVE REPORTING (Mar. 4, 2014), <http://cironline.org/reports/teens-rikers-island-solitary-confinement-pushes-mental-limits-6130>.

<sup>5</sup> North Carolina is the only other state that automatically prosecutes sixteen- and seventeen-year-olds as adults. Michael A. Corriero, *Judging Children as Children: Reclaiming New York’s Progressive Tradition*, 56 N.Y.L. SCH. L. REV. 1413, 1415 (2012).

<sup>6</sup> See Charles & Zuccarelli, *supra* note 1, at 739; Stephen A. Newman, *Foreword: The Past, Present, and Future of Juvenile Justice Reform in New York State*, 56 N.Y.L. SCH. L. REV. 1263, 1264 (2012); *Get the Facts*, RAISE THE AGE NY, <http://raisetheagency.com/get-the-facts> (last visited Feb. 20, 2015). A designated felony act is defined as “an act which, if done by an adult, would be a crime.” N.Y. FAM. CT. ACT. § 301.2(8) (McKinney 2014). A non-exhaustive list of these acts includes murder, kidnapping, arson, rape, and assault. *Id.*

<sup>7</sup> Bundy, *supra* note 4; *Culture of Violence Pervades Rikers’ Juvenile Facilities*, *supra* note 2.

<sup>8</sup> Bundy, *supra* note 4.

<sup>9</sup> Michael Winerip & Michael Schwartz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES, Jan. 13, 2015, [http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html?\\_r=0](http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html?_r=0).

<sup>10</sup> Bundy, *supra* note 4.

communal cry.<sup>11</sup> According to Ismael, teenagers desperate to avoid solitary confinement engaged in potentially life-threatening conduct, such as placing “AA batteries in their rectums.”<sup>12</sup> This, and any other act considered suicidal, resulted in temporary ineligibility for solitary confinement.<sup>13</sup> Although solitary confinement was an agonizing form of punishment for Ismael and similarly situated juveniles at Rikers, this form of abuse was but one of a myriad of issues for juveniles incarcerated at adult facilities.<sup>14</sup>

After years of criticism, in 2014 the New York City Department of Correction eliminated the use of solitary confinement for sixteen- and seventeen-year-old inmates.<sup>15</sup> Though these juveniles are no longer subjected to the rigors of solitary confinement, youth advocates argue that this change masks the true problem: “New York’s adult criminal justice system, including every county jail and adult correctional facility, is no place for children and youths.”<sup>16</sup>

Proponents of raising New York’s age of criminal responsibility argue that the prosecution of juveniles as adults has crippled a segment of the juvenile population and produced disastrous results for both the offenders and society as a whole.<sup>17</sup> New York prosecutes annually approximately 40,000–50,000

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See generally Tamar Birckhead, Op-Ed., *The Solitary Confinement of Youth*, JUVENILE JUSTICE INFO. EXCH. (Sep. 23, 2014), <http://jjie.org/op-ed-the-solitary-confinement-of-youth/>. While incarcerated at Rikers, Ismael was “attacked by four inmates who demanded his phone privileges and food commissary and required him to ask their permission before sitting in a chair or using a bathroom.” *Id.*

<sup>15</sup> Winerip & Schwirtz, *supra* note 9. On January 10, 2015, the New York City Board of Corrections approved a plan to eliminate solitary confinement for all inmates twenty-one years old and younger. *Id.* The policy change would take effect in 2016, but is contingent on funding. *Id.*

<sup>16</sup> Jennifer March, Letter to the Editor, *Keeping Youths Out of Adult Prisons*, N.Y. TIMES, Aug. 6, 2014, <http://www.nytimes.com/2014/08/07/opinion/keeping-youths-out-of-adult-prisons.html>.

<sup>17</sup> See, e.g., *Get the Facts*, *supra* note 6.

sixteen- and seventeen-year-olds as adults.<sup>18</sup> Juveniles incarcerated in adult facilities are “five times more likely to be sexually assaulted”<sup>19</sup> and “thirty-six times more likely to commit suicide” than juveniles in juvenile detention facilities.<sup>20</sup> While juvenile detention facilities offer rehabilitative and educational programs to support detainees, adult facilities have limited access to age-appropriate mental health, physical health, and educational services for the juveniles incarcerated there.<sup>21</sup> In addition, unlike family court adjudication for juveniles, criminal court adjudication affords no automatic sealing provision.<sup>22</sup> If processed in criminal court, designation as a Youthful Offender is a juvenile’s only opportunity for a sealed record.<sup>23</sup> Should these juveniles emerge from adult incarceration and attempt to become productive members of society, the stigma of a criminal record creates significant barriers to education, employment, and housing.<sup>24</sup>

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<sup>18</sup> WARREN A. REICH ET AL., CTR. FOR COURT INNOVATION, *THE CRIMINAL JUSTICE RESPONSE TO 16- AND 17-YEAR-OLD DEFENDANTS IN NEW YORK 2* (June 2014), available at [http://www.courtinnovation.org/sites/default/files/documents/ADP%20Y2%20Report%20Final%20\\_v2.pdf](http://www.courtinnovation.org/sites/default/files/documents/ADP%20Y2%20Report%20Final%20_v2.pdf).

<sup>19</sup> Prison Rape Elimination Act, 42 U.S.C. § 15601(4) (2003).

<sup>20</sup> CAMPAIGN FOR YOUTH JUSTICE, *JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 10* (November 2007) [hereinafter *JAILING JUVENILES*], available at [http://www.campaignfor-youthjustice.org/documents/CFYJNR\\_JailingJuveniles.pdf](http://www.campaignfor-youthjustice.org/documents/CFYJNR_JailingJuveniles.pdf).

<sup>21</sup> Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1454 (2012).

<sup>22</sup> Lisa Schreibersdorf, *Bringing the Best of Both Worlds: Recommendations for Criminal Justice Reform for Older Adolescents*, 35 CARDOZO L. REV. 1143, 1146 (2014); FINAL REPORT OF THE GOVERNOR’S COMMISSION ON YOUTH, PUBLIC SAFETY, AND JUSTICE: RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM IN NEW YORK STATE 3 (2015) [hereinafter *GOV.’S COMM’N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM*], available at [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReportofCommissiononYouthPublicSafetyandJustice\\_0.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReportofCommissiononYouthPublicSafetyandJustice_0.pdf).

<sup>23</sup> GOV.’S COMM’N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 3.

<sup>24</sup> Corriero, *supra* note 5, at 1419–22. This Note does not suggest that juveniles incarcerated in juvenile facilities face no barriers to education, employment, or housing post-incarceration. Rather, this Note argues that those barriers are heightened by adult incarceration.

Recent Supreme Court decisions have held that juveniles are constitutionally distinct from adults for sentencing purposes because of their immaturity, recklessness, and impulsivity.<sup>25</sup> Moreover, developments in brain imaging demonstrate that brain development continues into adulthood.<sup>26</sup> Juvenile brains are more active than adult brains in regions controlling aggression and fear, and less active than adult brains in regions associated with risk assessment and impulse control.<sup>27</sup> This research suggests that juveniles are not only less culpable than adults, but more receptive to rehabilitative intervention.<sup>28</sup> Though juveniles are physically, psychologically, and constitutionally different from adults, New York's criminal justice system fails to account for these differences. As a result, New York's children suffer.

To rectify New York's treatment of young offenders, this Note argues for four changes to the New York criminal justice system. First, the age of criminal responsibility in New York should be raised to eighteen. Second, New York should establish a separate youth court to adjudicate all cases involving sixteen- and seventeen-year-olds, and all designated felonies committed by thirteen-, fourteen-, and fifteen-year-olds. Third, New York should eliminate any provisions permitting the transfer of juveniles from family court to adult criminal court. Finally, district attorneys and judges should have discretion to authorize waiver from criminal court to youth court for select cases involving eighteen- to twenty-one-year-olds.

This Note proceeds in five parts. Part I provides a brief history of the juvenile justice system in New York and the evolution of New York's juvenile offender laws. Part II analyzes and compares New York's juvenile and adult criminal systems. Part III examines scientific research regarding juvenile brain development and the negative consequences of prosecuting juveniles as adults, and concludes that raising the age of criminal responsibility in New

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<sup>25</sup> See *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012); *Graham v. Florida*, 560 U.S. 48, 81 (2010); *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>26</sup> Brief of the American Medical Association et al. as Amici Curiae in Support of Respondent, *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (No. 03-633), 2004 WL 1633549, at \*12 [hereinafter AMA Brief].

<sup>27</sup> *Id.*

<sup>28</sup> See *Get the Facts*, *supra* note 6.

York will better serve youth offenders and the community. Part IV examines and critiques current proposals for augmenting New York's juvenile justice system. Part V puts forth the alternative recommendations to both laws and procedures described above.

This Note does not suggest that juveniles should not be held accountable for their actions. Rather, it proposes investing resources in rehabilitative and deterrent measures designed specifically for youth offenders. New York prosecutes and incarcerates juveniles at a time in their lives when they are most susceptible to rehabilitative intervention. Under the current paradigm, the State misses the precious opportunity to turn troubled teens into productive members of society.

#### I. HISTORICAL DEVELOPMENT OF NEW YORK STATE'S JUVENILE JUSTICE SYSTEM

New York's juvenile justice system has evolved significantly from its nineteenth century origins.<sup>29</sup> Once a leader in rehabilitative justice,<sup>30</sup> New York exchanged its progressive policies for punishment-based reform.<sup>31</sup> The efficacy of these reforms is now called into question, as brain imaging and sociological research suggests that New York's retributive system is failing its juveniles.<sup>32</sup>

##### A. Rehabilitative Origins

Though New York's early juvenile justice system often fell short of its rehabilitative aims,<sup>33</sup> its founding principles have reemerged in contemporary juvenile justice reform

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<sup>29</sup> See Alison Marie Grinnell, Note & Comment, *Searching for a Solution: The Future of New York's Juvenile Offender Law*, 16 N.Y.L. SCH. J. HUM. RTS. 635, 666–67 (2000).

<sup>30</sup> Jellisa Joseph, Note, *Catching Up: How the Youth Court Act Can Save New York State's Outdated Juvenile Justice System with Regard to Sixteen and Seventeen-Year-Old Offenders*, 7 ALB. GOV'T L. REV. 219, 222 (2014).

<sup>31</sup> See Grinnell, *supra* note 29, at 667.

<sup>32</sup> See *Get the Facts*, *supra* note 6.

<sup>33</sup> See Grinnell, *supra* note 29, at 639.



recommendations.<sup>34</sup> “[T]he reform and rehabilitation of New York children who have engaged in criminal activity—and their segregation from adult transgressors—dates from the early nineteenth century.”<sup>35</sup> In 1824, New York State formed the New York House of Refuge to offer juveniles rehabilitative treatment outside of the adult incarceration system.<sup>36</sup> New York founded the House of Refuge on the premise that juveniles required specialized treatment and could be rehabilitated through discipline and education.<sup>37</sup> This emphasis on juvenile rehabilitation was progressive; the facility was the first juvenile reformatory in the nation.<sup>38</sup> Though the House of Refuge was “[p]artly modeled upon the then new adult penitentiary system, children, unlike adults, received indeterminate sentences, which could remain in effect until age twenty-one.”<sup>39</sup> By 1846, male offenders under age eighteen and female offenders under age seventeen were precluded from adult incarceration. Thus, at its early stages, New York’s juvenile justice reform “prohibited the imprisonment of sixteen and seventeen year old children, an achievement which has eluded this state throughout the twentieth and twenty-first centuries.”<sup>40</sup> The New York House of Refuge operated for 110 years, closing in 1935 when the Society for the Reformation of Juvenile Delinquents in New York City dissolved.<sup>41</sup>

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<sup>34</sup> See Katharine Lazarow, Note, *The Continued Viability of New York’s Juvenile Offender Act in Light of Recent National Developments*, 57 N.Y.L. SCH. L. REV. 595, 616 (2013).

<sup>35</sup> Merrill Sobie, *Pity the Child: The Age of Delinquency in New York*, 30 PACE L. REV. 1061, 1066 (2010) [hereinafter Sobie, *Pity the Child*].

<sup>36</sup> Jordan K. Hummel, Note, *The Bitter Side of Sweet Sixteen: Why New York Should Amend Its Juvenile Transfer Laws*, 27 J. CIV. RTS. & ECON. DEV. 261, 269 (2014).

<sup>37</sup> Joseph, *supra* note 30. Despite its rehabilitative premise, the New York House of Refuge received criticism for its use of retributive measures, such as physical abuse and solitary confinement. Grinnell, *supra* note 29, at 639.

<sup>38</sup> Joseph, *supra* note 30.

<sup>39</sup> Merrill Sobie, *Family Court—A Short History*, 1 Jud. Notice 6 (2011) [hereinafter Sobie, *Family Court*], available at <http://digitalcommons.pace.edu/lawfaculty/858/>.

<sup>40</sup> Sobie, *Pity the Child*, *supra* note 35, at 1067.

<sup>41</sup> The Greatest Reform School in the World: A Guide to the Records of the New York House of Refuge, N.Y. State Archives 6 (1989), available at

In 1902, New York County created a specialized juvenile court, tasked with adjudicating juvenile cases for offenders under age sixteen.<sup>42</sup> This court was a division of the adult criminal court system and utilized the same judicial proceedings.<sup>43</sup> The New York State Legislature decriminalized most juvenile offenses in 1909.<sup>44</sup> When the legislature realized that juveniles required further distinct treatment from adults, New York created an independent juvenile court—the New York State Children’s Court—in 1922.<sup>45</sup> Juveniles younger than sixteen “were within the exclusive jurisdiction of the Children’s Court.”<sup>46</sup> The Children’s Court’s jurisdiction excluded juveniles charged with capital offenses or offenses punishable by life imprisonment, as well as all juveniles over fifteen.<sup>47</sup> The Children’s Court’s low jurisdictional age limit garnered criticism almost immediately—criticism that has continued for close to a century.<sup>48</sup> Despite numerous legislative attempts to raise the age of criminal responsibility,<sup>49</sup> the New York State Legislature has consistently “tabled the issue for future review.”<sup>50</sup>

In establishing the Children’s Court, “[s]aving the child had become the paramount consideration—the underlying conduct, criminal or non-criminal . . . was viewed merely as symptomatic or as one consideration in formulating a rehabilitative prescription.”<sup>51</sup>

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[http://www.archives.nysed.gov/a/research/res\\_topics\\_ed\\_reform.pdf](http://www.archives.nysed.gov/a/research/res_topics_ed_reform.pdf).

<sup>42</sup> Grinnell, *supra* note 29, at 639.

<sup>43</sup> *Id.*

<sup>44</sup> GOV.’S COMM’N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 3.

<sup>45</sup> Merrill Sobie, *The Juvenile Offender Act: Effectiveness and Impact on the Juvenile Justice System*, 26 N.Y. L. SCH. L. REV. 677, 682 (1981).

<sup>46</sup> Grinnell, *supra* note 29, at 640.

<sup>47</sup> *Id.*

<sup>48</sup> Hummel, *supra* note 36, at 270.

<sup>49</sup> These legislative attempts include the 1942 Joint Legislative Committee on Children’s Court Jurisdiction and Juvenile Delinquency, the 1961 New York Constitutional Convention, the 1978 Juvenile Offender Law, the 2012 New York Senate Bill 7394, and the 2012 New York Senate Bill 7020. Hummel, *supra* note 36, at 270; Joseph, *supra* note 30, at 238–39.

<sup>50</sup> Hummel, *supra* note 36, at 270; Joseph, *supra* note 30, at 238–39.

<sup>51</sup> MERRIL SOBIE, *THE CREATION OF JUVENILE JUSTICE: A HISTORY OF NEW YORK’S CHILDREN’S LAWS* 176 (1987).

The court assumed a *parens patriae* role.<sup>52</sup> Judges were given wide discretion to impose indeterminate sentences that could remain in effect until the juvenile reached the age of majority.<sup>53</sup> In electing to separate juvenile and adult criminal offenders, “juvenile courts rejected both the criminal law’s jurisprudence and its procedural safeguards.”<sup>54</sup> For example, the Children’s Court initially utilized both jury trials and the reasonable doubt standard for determining delinquency.<sup>55</sup> However, as early as the 1930s the court relaxed these procedural safeguards, deeming them unnecessary in light of the aim to treat rather than punish the child.<sup>56</sup> The right to an attorney,<sup>57</sup> jury trials, and the right against self-incrimination were thus eliminated.<sup>58</sup>

The 1961 New York State Constitutional Convention dissolved the Children’s Court and reorganized the juvenile court system.<sup>59</sup> The 1962 Family Court Act replaced the Children’s Court.<sup>60</sup> The Family Court Act “created a uniform court system, granting jurisdiction to family courts to handle cases involving ‘every symptom of familial dysfunction,’ including, but not limited to child neglect, juvenile delinquency, intra-family violence, and paternity suits.”<sup>61</sup> The Family Court Act “incorporated several landmark provisions” and procedural safeguards that the Children’s Court lacked: children were assigned counsel, permitted to conduct discovery, introduce evidence, and appeal adverse

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<sup>52</sup> Barry C. Feld, *Juvenile and Criminal Justice Systems’ Responses to Youth Violence*, 24 CRIME & JUST. 189, 192 (1998). *Parens patriae*, Latin for “parent of his or her country,” refers to the state’s capacity to protect those unable to care for themselves. BLACK’S LAW DICTIONARY 1287 (10th ed. 2014).

<sup>53</sup> Feld, *supra* note 52, at 193.

<sup>54</sup> *Id.* at 192.

<sup>55</sup> Grinnell, *supra* note 29, at 640.

<sup>56</sup> *Id.* at 640–41.

<sup>57</sup> Feld, *supra* note 52, at 192.

<sup>58</sup> Grinnell, *supra* note 29, at 640–41.

<sup>59</sup> GOV.’S COMM’N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 4.

<sup>60</sup> *Id.*

<sup>61</sup> Ashley A. Hughes, *The Evolution of Youth as an Excuse: Striking a Balance Between the Interest of Public Safety and the Principle That Kids Are Kids*, 29 TOURO L. REV. 967, 994 (2013).

decisions.<sup>62</sup> Additional family court protections included the potential for complete disposition of a case following probation, no mandatory sentencing requirements, and sealed juvenile records.<sup>63</sup> Family court retained exclusive jurisdiction over children at least seven years old and less than sixteen years old, unless the child was fifteen years or older and charged with an offense punishable by death or life imprisonment.<sup>64</sup> However, under the 1962 Family Court Act, a criminal court judge could waive into family court a juvenile who was fifteen years old or older if he had been charged with a capital or life-imprisonment offense.<sup>65</sup>

### *B. Retributive Juvenile Justice Reform*

Though the Children's Court and the 1962 Family Court Act laid a rehabilitative foundation for New York's juvenile justice system,<sup>66</sup> increases in juvenile crime during the 1970s<sup>67</sup> sparked a wave of retributive reform.<sup>68</sup> Media outlets and politicians sensationalized the surge in violence, attributing it to various factors, including the crack epidemic, gang violence, and gun accessibility.<sup>69</sup> Reacting to mounting public pressure for more stringent juvenile punishments,<sup>70</sup> the New York State Legislature adopted the Juvenile Justice Reform Act of 1976.<sup>71</sup> The 1976 Act

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<sup>62</sup> Sobie, *Family Court*, *supra* note 39, at 7.

<sup>63</sup> Hughes, *supra* note 61, at 995.

<sup>64</sup> Grinnell, *supra* note 29, at 641.

<sup>65</sup> *Id.*

<sup>66</sup> See Hughes, *supra* note 61, at 994.

<sup>67</sup> See Lazarow, *supra* note 34, at 596 n.2.

<sup>68</sup> See GOV.'S COMM'N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 4–5.

<sup>69</sup> Lazarow, *supra* note 34, at 602.

<sup>70</sup> “Media hype surrounding isolated incidents of excessive juvenile violence and predictions of a coming wave of super-predators and fledgling psychopaths hastened this philosophical shift by arousing public alarm and serving as the platform for politicians to compete to demonstrate that they aimed to get tough on crime.” Michael J. Ritter, *Just (Juvenile Justice) Jargon: An Argument for Terminological Uniformity Between the Juvenile and Criminal Justice Systems*, 37 AM. J. CRIM. L. 221, 228–29 (2010) (internal quotation marks, alterations, and citations omitted).

<sup>71</sup> Michelle Haddad, Note, *Catching Up: The Need for New York State To*

amended the purpose of the Family Court Act to balance the needs of juveniles against the consideration for community safety.<sup>72</sup>

The inclusion of a community interest provision in the Family Court Act's purpose signaled "a sharp philosophical change from the concept of individualized justice based solely on the needs and interests of the child."<sup>73</sup> In furtherance of protecting community interests, the 1976 Juvenile Justice Reform Act created a "new category of delinquency"—"designated felony"—for certain violent crimes, including robbery and homicide.<sup>74</sup> Children ages fourteen and fifteen charged with the commission of a designated felony were eligible for harsher punishments, such as restrictive confinement for three to five years.<sup>75</sup> Though the 1976 Act provided for harsher penalties, its overall tenor remained rooted in juvenile treatment and rehabilitation.<sup>76</sup> The 1976 Act was unexpectedly short lived—a mere two years later the sensationalized crimes of one New York juvenile would precipitate sweeping juvenile justice reform.<sup>77</sup>

In March of 1978, a fifteen-year-old New York boy committed a series of violent crimes that ignited a "national wave in favor of mandating transfer to adult criminal court for violent young offenders."<sup>78</sup> On a subway approaching Yankee Stadium, fifteen-year-old Willie Bosket<sup>79</sup> shot a sleeping man twice in the head.<sup>80</sup>

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*Amend Its Juvenile Offender Law To Reflect Psychiatric, Constitutional and Normative National Trends Over the Last Three Decades*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 455, 458 (2009).

<sup>72</sup> N.Y. FAM. CT. ACT § 301.1 (McKinney 2014) ("In any proceeding under this article, the court shall consider the needs and best interests of the respondent as well as the need for protection of the community.").

<sup>73</sup> SOBIE, *supra* note 51, at 169.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Haddad, *supra* note 71, at 459–60.

<sup>77</sup> *See id.* at 457–60; GOV.'S COMM'N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 5.

<sup>78</sup> Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer To Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 383 (1998).

<sup>79</sup>

An interesting and disturbing fact of Willie Bosket's life history is that he had, for a bulk of his childhood, been the

Bosket removed a ring and a watch from the man's hand, fifteen dollars from the man's pocket, and then left the scene of the crime.<sup>81</sup> Less than one week later, Bosket shot and killed a second subway passenger and injured a train yard dispatcher.<sup>82</sup> The murders and subsequent trial were highly publicized,<sup>83</sup> and the media referred to Bosket as "the Baby-Faced Butcher."<sup>84</sup> Due to Bosket's age, his case was adjudicated in a Bronx family court, where he was found guilty of both murders.<sup>85</sup> In accordance with the 1976 Juvenile Justice Reform Act, Bosket received the maximum penalty for his crimes: five years of incarceration at a juvenile facility, with no permanent criminal record.<sup>86</sup>

Unsurprisingly, the resulting public outcry for "tough on crime" legislation was heeded in that gubernatorial election year.<sup>87</sup>

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victim of severe physical and sexual abuse and spent a great deal of time in the custody of New York's juvenile justice system for committing minor crimes. Despite having been confined to their care, almost every opportunity to rehabilitate him and address his needs was missed.

Travis Johnson, *All Children Are Created Equal Too: The Disparate Treatment of Youth Rights in America*, 15 CUNY L. REV. 173, 182 (2011).

<sup>80</sup> Haddad, *supra* note 71, at 456.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Klein, *supra* note 78, at 383–84.

<sup>85</sup> Haddad, *supra* note 71, at 456.

<sup>86</sup> Johnson, *supra* note 79, at 182. Just three months after his release from the juvenile facility, Bosket was arrested for attempted robbery and assault. Haddad, *supra* note 71, at 456 n.4. During his incarceration Bosket earned two more convictions, resulting in a sentence of twenty-five years to life imprisonment. *Id.* While serving this sentence, Bosket stabbed a prison guard in the chest, resulting in a conviction for attempted murder. *Id.* Between 1985 and 1994, Bosket received more than 250 disciplinary violations. John Eligon, *Two Decades in Solitary*, N.Y. TIMES, Sept. 22, 2008, [http://www.nytimes.com/2008/09/23/nyregion/23inmate.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/09/23/nyregion/23inmate.html?pagewanted=all&_r=0). In 1994, Bosket was relegated to solitary confinement, and is eligible to rejoin the general prison population in 2046. *Id.*

<sup>87</sup> See Johnson, *supra* note 79, at 182; Michael A. Corriero, with Alison M. Hamanjian, *Advancing Juvenile Justice Reform in New York A Proposed Model*, 80 N.Y. ST. B.J. 20, 21 (2008) ("In 1978, an extraordinary case of juvenile violence, a gubernatorial election and public frustration with the juvenile justice

Just two weeks after Bosket's sentencing, New York Governor Hugh Carey opened a special legislative session,<sup>88</sup> which evidenced "the legislature's outraged state of mind and thirst for retribution."<sup>89</sup> A few months later, the New York State Legislature adopted the 1978 Juvenile Offender Act, which remains in effect today.<sup>90</sup>

The 1978 Act lowered the age of criminality from sixteen to thirteen for the most serious violent offenses.<sup>91</sup> The New York State Legislature vested criminal court, as opposed to family court, with original jurisdiction over thirteen-year-olds charged with second degree murder or a sexually motivated felony, and fourteen- and fifteen-year-olds charged with second degree murder, manslaughter, kidnapping, arson, assault, rape, criminal sexual act, aggravated sexual abuse, burglary, robbery, possession of a firearm on school grounds, attempted murder, attempted kidnapping, or a sexually motivated felony.<sup>92</sup> The 1978 Act designated the term Juvenile Offender to describe these thirteen-, fourteen-, and fifteen-year-olds.<sup>93</sup>

Under the 1978 Act, Juvenile Offenders are treated as adults at arrest and prosecuted in criminal court.<sup>94</sup> Waiver of Juvenile Offenders to family court is possible, but occurs only at the discretion of the district attorney or judge.<sup>95</sup> Under New York Penal law, the sentencing ranges for Juvenile Offenders in criminal court occupy the middle of a spectrum—available sentence ranges are "less severe than for adults but more severe than those

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system resulted in enactment of New York's Juvenile Offender Law.").

<sup>88</sup> Lazarow, *supra* note 34, at 603.

<sup>89</sup> Haddad, *supra* note 71, at 464. Notably, after approving the 1976 Juvenile Reform Act, Governor Carey publicly discussed his support of the Legislature's decision to rehabilitate juvenile offenders outside of the adult criminal justice system. *Id.* at 463.

<sup>90</sup> *Id.* at 457.

<sup>91</sup> Hummel, *supra* note 36, at 271–72; Grinnell, *supra* note 29, at 643.

<sup>92</sup> N.Y. PENAL LAW § 10.00(18) (McKinney 2014); Charles & Zuccarelli, *supra* note 1, at 739–40.

<sup>93</sup> GOV.'S COMM'N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 5.

<sup>94</sup> *Id.*

<sup>95</sup> Hummel, *supra* note 36, at 272.

available for juveniles convicted of [designated felony acts] in Family Court.”<sup>96</sup>

The 1978 Juvenile Offender Act not only lowered the age of criminal responsibility, but increased mandatory sentences for violent offenders, required mandatory incarceration for certain violent crimes, and restricted the plea bargaining process for all violent offenders.<sup>97</sup> Under the 1978 Act, if a juvenile is prosecuted in criminal court, his only means of avoiding a permanent felony record is designation as a “Youthful Offender.”<sup>98</sup> Youthful Offender treatment seals all related records,<sup>99</sup> but may be granted via judicial discretion only in limited circumstances.<sup>100</sup> Moreover, even though a grant of Youthful Offender status may seal a juvenile’s record, he is still required to navigate the adult adversarial court system, where retributive sanctions take precedent over rehabilitative ones.<sup>101</sup>

New York State was not alone in adopting tough-on-juvenile-crime policies. “Anxious to establish their crime control credentials, politicians across the country turned untested ideas into guiding principles and promulgated criminal and juvenile justice policies without any attention to whether the promised

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<sup>96</sup> GOV.’S COMM’N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 5.

<sup>97</sup> Haddad, *supra* note 71, at 460.

<sup>98</sup> *Id.* at 462.

<sup>99</sup> Hummel, *supra* note 36, at 272.

<sup>100</sup> N.Y. CRIM. PROC. LAW § 720.10 (McKinney 2014). Adolescents accused of murder, armed felonies, or sex crimes are ineligible for Youthful Offender Status, unless

[T]he court determines that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant’s participation was relatively minor although not so minor as to constitute a defense to the prosecution.

*Id.* In determining whether to grant Youthful Offender status, the court balances “the nature of the offense, whether the victim suffered any physical injuries, the defendant’s role in the offense, the defendant’s prior criminal history, as well as the recommendations of both the prosecutor and defense counsel.” Grinnell, *supra* note 29, at 647–48.

<sup>101</sup> Haddad, *supra* note 71, at 462.



outcomes would ever occur.”<sup>102</sup> Between 1970 and 1990, forty jurisdictions reduced the minimum age for criminal prosecutions, twelve states eliminated the minimum age requirement for the transfer of juveniles into adult criminal court, and Congress expanded the number of federal crimes with which a juvenile could be charged.<sup>103</sup> Though tough-on-juvenile-crime reforms swept the nation,<sup>104</sup> New York retains the lowest age of criminal responsibility, joined only by North Carolina.<sup>105</sup>

## II. COMPARING THE ADULT AND JUVENILE CRIMINAL JUSTICE SYSTEMS IN NEW YORK

Rehabilitation, deterrence, and in extreme cases, incapacitation, serve as the philosophical foundations of New York’s juvenile justice system.<sup>106</sup> The adult criminal justice system varies by degree—it is less rehabilitative and more punitive than the juvenile system, exemplified by harsher sentences, fewer educational opportunities for incarcerated persons, and harsher incarceration conditions.<sup>107</sup>

Family court has original jurisdiction over Persons In Need Of Supervision (PINS) and Juvenile Delinquents.<sup>108</sup> The term PINS denotes a status offender younger than eighteen who is processed for non-criminal behavior.<sup>109</sup> The term Juvenile Delinquent denotes a child from seven to fifteen years old who commits an offense that would be criminal if the child were over age fifteen.<sup>110</sup> Criminal court, as opposed to family court, has original jurisdiction

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<sup>102</sup> Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143, 156 (2014).

<sup>103</sup> *Id.* at 157.

<sup>104</sup> *Id.*

<sup>105</sup> See Corriero, *supra* note 5, at 1415.

<sup>106</sup> Ellie D. Shefi, Note, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 U. MICH. J.L. REFORM 653, 654 (2003).

<sup>107</sup> See Charles & Zuccarelli, *supra* note 1, at 728–30.

<sup>108</sup> See GOV’S COMM’N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 10, 15.

<sup>109</sup> *Id.* at 10.

<sup>110</sup> *Id.*

over Juvenile Offenders—juveniles aged thirteen to fifteen who commit designated felony offenses.<sup>111</sup> Criminal court also has original jurisdiction over all adults—persons sixteen years and older who commit a criminal offense or violation.<sup>112</sup>

A defendant's designation—as a PINS, Juvenile Delinquent, Juvenile Offender, or Adult—affects jurisdiction, which in turn affects adjustment opportunities, detention facilities, confinement facilities, and whether the defendant retains a criminal record.<sup>113</sup> A juvenile processed through the family court system may benefit from “adjustment”—diversion of the juvenile's case from the prosecutor's office to the Department of Probation.<sup>114</sup> First, the juvenile and his parental guardian meet with a probation officer to determine if the juvenile's case is eligible.<sup>115</sup> If all parties select adjustment as an appropriate measure, the juvenile may participate in rehabilitative programs in lieu of prosecution.<sup>116</sup> According to recent studies, thirty-eight percent or more of cases processed in family court are selected for adjustment.<sup>117</sup>

The Department of Probation considers a number of factors in making an adjustment determination, including the gravity of the offense and the juvenile's likelihood of re-offending.<sup>118</sup> If a juvenile's case is not selected for adjustment, it is referred to a specialized juvenile prosecutor.<sup>119</sup> The prosecutorial process includes a “mandatory investigation by the probation department into the academic, emotional, social, and familial background” of the juvenile.<sup>120</sup> Both the prosecutor and the court utilize this information to determine the appropriate punishment or remedial measure for the juvenile.<sup>121</sup> In accordance with the Family Court Act, disposition of a juvenile's case requires the court to “order the

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Schreibersdorf, *supra* note 22, at 1146.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1146–47.

<sup>117</sup> *Id.* at 1147.

<sup>118</sup> *Id.* at 1146 n.12.

<sup>119</sup> *Id.* at 1146.

<sup>120</sup> *Id.* at 1147.

<sup>121</sup> *Id.*

least restrictive” means deemed “consistent with the needs and best interests of the respondent and the need for protection of the community.”<sup>122</sup> This sentencing requirement affords the court wide latitude to consider the best interests of the child and community, in light of a holistic assessment of both the juvenile and his offense.

The sealing provision is arguably the most advantageous benefit of family court adjudication.<sup>123</sup> Juvenile proceedings in family court are sealed, which ensures that as a juvenile transitions into adulthood, his educational, employment, and housing opportunities are not stunted by youth offenses.<sup>124</sup> In contrast, criminal court adjudication of sixteen-year-olds, seventeen-year-olds, and Juvenile Offenders affords no automatic sealing provision.<sup>125</sup> For these juveniles, designation as a Youthful Offender is the only opportunity for a sealed record.<sup>126</sup> As discussed in Part I, Youthful Offender status “provides the opportunity for any youth under the age of 19 to have a criminal conviction substituted with a noncriminal adjudication at sentencing.”<sup>127</sup> Youthful Offender status is mandatory for juveniles under age nineteen who are convicted of a misdemeanor with no prior convictions or Youthful Offender determinations.<sup>128</sup> Otherwise, a Youthful Offender determination is discretionary.<sup>129</sup> Moreover, juveniles convicted of Class A felonies are prohibited from Youthful Offender status.<sup>130</sup> In New York, approximately “1,600 juveniles per year are saddled with criminal records that create[] barriers to success for the rest of their lives.”<sup>131</sup>

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<sup>122</sup> N.Y. FAM. CT. ACT § 352.2 (McKinney 2014).

<sup>123</sup> Schreibersdorf, *supra* note 22, at 1148.

<sup>124</sup> *Id.*

<sup>125</sup> GOV.’S COMM’N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 134.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 134 n.536.

<sup>131</sup> Andrew M. Cuomo, Opportunity Agenda: 2015 State of the State 279 (2015), *available at* [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2015\\_Opp](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2015_Opp)

PINS and Juvenile Delinquents processed in family court are detained pre-trial and confined post-trial in a juvenile facility<sup>132</sup> that often resembles a group home.<sup>133</sup> A Juvenile Offender processed in criminal court is detained pre-trial in a secure youth facility and confined post-trial in an Office of Children and Family Services (OCFS) secure center. Juveniles age sixteen and older are detained pre-trial and confined post-trial in adult correctional facilities—either county jails or prisons.<sup>134</sup> Juvenile and adult correctional facilities differ in numerous ways, including services and population.<sup>135</sup> Adult prisons employ approximately one teacher for every one hundred inmates and one security staff member for every four inmates.<sup>136</sup> Juvenile facilities employ one teacher per every fifteen residents and one custodial or monitoring staff member per every eleven residents.<sup>137</sup> In terms of counseling, adult prisons employ one medical staff member for every twenty-five inmates—with the term medical staff describing a broad category of medical and technical staff that includes counselors. Two-thirds of juvenile facilities employ one counselor for every ten residents.<sup>138</sup>

In adult facilities, inmates generally have greater size and strength, more extensive criminal histories, and more experience with incarceration than juveniles housed in juvenile facilities.<sup>139</sup> While approximately fifty-three percent of adult prison inmates in

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<sup>132</sup> New York's juvenile detention facilities have received harsh criticism for "intolerable conditions." See Newman, *supra* note 6, at 1264 ("The U.S. Department of Justice (DOJ) investigated four New York juvenile detention facilities and issued a report in August 2009 finding that juveniles held in confinement were regularly being abused, severely injured, and deprived of constitutional rights.").

<sup>133</sup> See GOV.'S COMM'N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 10; Schreibersdorf, *supra* note 22, at 1148.

<sup>134</sup> See GOV.'S COMM'N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 10; Schreibersdorf, *supra* note 22, at 1148.

<sup>135</sup> Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 139–40 (2000).

<sup>136</sup> *Id.* at 140.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 139.

state facilities are violent offenders,<sup>140</sup> approximately thirty-three percent of juveniles in juvenile detention facilities are violent offenders.<sup>141</sup> In summary, juveniles incarcerated in adult correctional facilities have less access to education and health programs and are exposed to older, stronger, more violent, and more seasoned offenders.

### III. RAISING THE AGE OF CRIMINAL RESPONSIBILITY IN NEW YORK

During the past fifteen years, the scientific community has developed a wealth of research demonstrating that juveniles have both reduced culpability for criminal conduct and greater capacity for rehabilitation.<sup>142</sup> This capacity for positive change is squandered when juveniles are prosecuted as adults. Juveniles prosecuted as adults retain a criminal record, which can cripple their education, employment, and housing opportunities.<sup>143</sup> Juveniles incarcerated with adults are at heightened risk for emotional abuse, sexual abuse, and criminal socialization.<sup>144</sup> Moreover, juveniles incarcerated with adults have limited access to educational and rehabilitative programs, which further hinders successful societal reintegration post-incarceration.<sup>145</sup> Empirical studies of juveniles sentenced as adults conclude that adult sentencing has no deterrent effect on juvenile crime and in fact increases recidivism.<sup>146</sup> Taken in sum, prosecuting juveniles as

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<sup>140</sup> The Sentencing Project, Fact Sheet: Trends in U.S. Corrections 4 (2011), available at [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf).

<sup>141</sup> CAMPAIGN FOR YOUTH JUSTICE, Facts: Youth in the Justice System 2 (last updated April 2012), available at <http://www.campaignfor-youthjustice.org/documents/KeyYouthCrimeFacts.pdf>.

<sup>142</sup> See Taylor-Thompson, *supra* note 102, at 158–59.

<sup>143</sup> Corriero, *supra* note 5, at 1419.

<sup>144</sup> See Wood, *supra* note 21, at 1450–51; JAILING JUVENILES, *supra* note 20, at 4.

<sup>145</sup> See Wood, *supra* note 21, at 1454.

<sup>146</sup> See Robert Anthonson, Note, *Furthering the Goal of Juvenile Rehabilitation*, 13 J. GENDER RACE & JUST. 729, 741 (2010) (discussing two studies that concluded that the adult prosecution of juveniles in New York and

adults benefits neither the juvenile nor the community.

*A. Scientific Research Regarding Juvenile Brain Function*

U.S. Supreme Court decisions in the last ten years reflect the Court's understanding that "adolescents are unfinished products, developmentally and morally" and "that these factors hold constitutional significance."<sup>147</sup> The Court has invalidated, on Eighth Amendment grounds, the following sentences for juveniles: capital punishment for those less than eighteen years of age,<sup>148</sup> life sentence without parole for non-homicide convictions,<sup>149</sup> and mandatory life sentences for those convicted of homicide.<sup>150</sup> In reaching these decisions, the Court focused on "three significant gaps between children and adults" that reduce the juvenile's culpability, including the juvenile's (1) underdeveloped sense of responsibility, which leads to impulsive and reckless decisions, (2) inability to remove himself from negative influences and vulnerability to such negative influences and pressures, and (3) underdeveloped moral character, which indicates that his actions do not necessarily exemplify permanent depravity.<sup>151</sup> The Court supported its conclusions, in part, with scientific research regarding juvenile brain structure and social science research regarding juvenile behavior.<sup>152</sup>

Scientific studies of the brain regions associated with emotional impulses and impulse control conclude that adolescent brains are more active than adult brains in regions controlling aggression and fear, and less active than adult brains in areas controlling risk assessment and impulse control regions.<sup>153</sup> This

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Idaho produced no deterrent effect on juvenile crimes rates and two studies that concluded that New York and Florida juveniles prosecuted as adults are more likely to reoffend).

<sup>147</sup> Taylor-Thompson, *supra* note 102, at 146 (discussing the Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012)).

<sup>148</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>149</sup> *Graham v. Florida*, 560 U.S. 48, 81 (2010).

<sup>150</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

<sup>151</sup> *Miller*, 132 S. Ct. at 2464; Hummel, *supra* note 36, at 278.

<sup>152</sup> Taylor-Thompson, *supra* note 102, at 163.

<sup>153</sup> AMA Brief, *supra* note 26, at \*12.

research demonstrates that juveniles are less culpable than adults for their actions.

It is impossible to understand the differences between juvenile and adult criminal responsibility without first examining key scientific aspects of the brain. The limbic system serves as the brain's emotional center,<sup>154</sup> within which sits the neural system known as the amygdala.<sup>155</sup> The amygdala is often associated with aggressive and impulsive behavior, as it has evolved to produce fight or flight responses to danger.<sup>156</sup> The frontal lobes, by contrast, are associated with emotional regulation and response inhibition.<sup>157</sup> More specifically, "complex information-processing functions such as perception, thinking, and reasoning"<sup>158</sup> occur in the neocortex and "the prefrontal cortex is associated with . . . decision making, risk assessment, ability to judge future consequences, evaluating reward and punishment, behavioral inhibition, impulse control, deception, responses to positive and negative feedback, and making moral judgment."<sup>159</sup> Recent developments in brain imaging demonstrate that adolescents have highly active limbic systems and less active frontal lobes.<sup>160</sup> As adolescents mature, brain activity gradually shifts from the amygdala to the frontal lobes.<sup>161</sup> Thus, until critical brain development is complete, the impulse-controlling frontal lobe

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<sup>154</sup> *Id.* at \*12 (citing Daniel J. Siegel, *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE*, 10 (Guilford Press 1999)).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at \*12–13 (citing Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1, 1 (1999)).

<sup>157</sup> Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999).

<sup>158</sup> AMA Brief, *supra* note 26, at \*13–14 (quoting DANIEL J. SIEGEL, *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE*, 10 (Guilford Press 1999)).

<sup>159</sup> *Id.* at \*13–14.

<sup>160</sup> *Id.* at \*15.

<sup>161</sup> *Id.* (citing K. Rubia et al., *Functional Frotalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 13 (2000)).

“exerts less control” over the amygdala.<sup>162</sup> Neurological research suggests that this critical brain development continues until the early twenties.<sup>163</sup> Behavioral scientists have long described juveniles as emotionally volatile, impulsive, and poor evaluators of risk assessment.<sup>164</sup> Brain imaging technology now accounts for these traits and the juvenile’s ability to outgrow them, which demonstrates that juveniles are less culpable than adults for their criminal actions.<sup>165</sup>

Brain imaging has also confirmed that adolescent brains are structurally underdeveloped in regions relating to reasoning and impulse control.<sup>166</sup> The prefrontal cortex remains structurally immature throughout adolescence, because both myelination and pruning are incomplete.<sup>167</sup> Myelin, a fatty white substance, insulates neural fibers that use electrical impulses to relay information.<sup>168</sup> “The presence of myelin makes communications between different parts of the brain faster and more reliable” and the development of myelin continues throughout adolescence.<sup>169</sup> The presence of myelin is a sign of brain maturity and myelination in the frontal cortex—the risk assessment and impulse control center—continues until late adolescence.<sup>170</sup> Neuroscience research

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<sup>162</sup> *Id.*

<sup>163</sup> Anthonsen, *supra* note 146, at 744 (citing KEN C. WINTERS, MENTOR FOUNDATION, ADOLESCENT BRAIN DEVELOPMENT AND DRUG ABUSE 4 (2008)).

<sup>164</sup> AMA Brief, *supra* note 26, at \*11.

<sup>165</sup> See Taylor-Thompson, *supra* note 102, at 189–90 (“So, as neurological and behavioral science demonstrates, a typical fourteen-year-old will have an underdeveloped sense of self and underdeveloped cognitive and emotional controls that will lead her to submit to peer pressure and engage in thrill-seeking, often criminal conduct. But those actions, no matter how dangerous, do not indicate that she is either irretrievably depraved or fundamentally flawed. She, fortunately, will continue to develop and will mature out of offending.”).

<sup>166</sup> AMA Brief, *supra* note 26, at \*16.

<sup>167</sup> *Id.* at \*17.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at \*16 (quoting ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND 144 (2001)).

<sup>170</sup> See Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCIENCE 309, 311–12 (2003) (using high resolution structural MRI to study gray matter density in individuals ages seven



suggests that immature myelination contributes to adolescent immaturity, and that the increased white matter in adult brains affords the “cognitive complexity” that facilitates impulse control.<sup>171</sup>

Pruning, like myelination, is crucial to brain maturity and also occurs late into adolescence.<sup>172</sup> Pruning is a process by which gray matter—brain cells responsible for frontal lobe tasks—is decreased.<sup>173</sup> Pruning both establishes and extinguishes neural pathways, improving the overall functioning of the frontal lobes.<sup>174</sup> Thus, “[o]ne of the last areas of the brain to reach full maturing, as measured by pruning, is the part associated with regulating behavior, stifling impulses, assessing risks, and moral reasoning.”<sup>175</sup> This research holds profound significance for adolescents’ responsibility for their actions, even when such actions are criminal. To expect juveniles to demonstrate the judgment or impulse control of adults is to expect them “to transcend their own psychological [and] biological capacities.”<sup>176</sup>

### *B. Harms of Treating Adolescent Offenders as Adults*

In light of the scientific research demonstrating juvenile capacity for rehabilitation, the adult prosecution and incarceration of New York’s juveniles is all the more tragic. Juveniles incarcerated with adults are at increased risk for sexual abuse, depression, and criminal socialization,<sup>177</sup> and have limited access

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to eighty-seven and finding, among other things, that “the trajectory of maturational and aging effects varied considerably over the cortex,” with myelination continuing into adulthood in the frontal neocortices).

<sup>171</sup> Taylor-Thompson, *supra* note 102, at 187.

<sup>172</sup> AMA Brief, *supra* note 26, at \*19. *See also* Winters, *supra* note 163, at 4 (explaining that pruning is essential “for more efficient and faster information-processing” and that the areas of the brain associated with “reasoning and judgment are developing well into the early to mid 20s”).

<sup>173</sup> AMA Brief, *supra* note 26, at \*19.

<sup>174</sup> *Id.* *See also* Winters, *supra* note 163, at 4.

<sup>175</sup> AMA Brief, *supra* note 26, at \*20.

<sup>176</sup> *Id.*

<sup>177</sup> Wood, *supra* note 21, at 1450–51; JAILING JUVENILES, *supra* note 20, at 4.

to age-appropriate mental health, physical health, and educational services.<sup>178</sup> In addition, juveniles prosecuted as adults retain a criminal record, which can cripple their education, employment, and housing opportunities.<sup>179</sup> As a result of these impediments to reintegration, adolescents processed in criminal court continue cycling through the criminal justice system.<sup>180</sup>

### 1. Harms Suffered by Juveniles in Adult Prisons and Jails

Juveniles incarcerated in adult facilities are at high risk for sexual victimization.<sup>181</sup> Juveniles who are underdeveloped “physically, cognitively, socially, or emotionally, are less capable of protecting themselves from sexual advances and assault.”<sup>182</sup> Sexual abuse often begins within forty-eight hours of a juvenile’s incarceration in an adult facility.<sup>183</sup> Juveniles in adult facilities “are five times more likely to be sexually assaulted” than their counterparts in juvenile detention centers.<sup>184</sup> In 2005, though juveniles accounted for less than one percent of the jail population, they were victims in twenty-one percent of substantiated inmate-on-inmate sexual violence.<sup>185</sup>

Sexual abuse and rape have emotional and psychological consequences, such as depression and posttraumatic stress disorder.<sup>186</sup> “Juveniles who have been sexually abused may face problems with anger, impulse control, flashbacks, dissociative episodes, hopelessness, despair, and persistent distrust and withdrawal.”<sup>187</sup> In addition, sexual assault and rape exposes

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<sup>178</sup> Wood, *supra* note 21, at 1454.

<sup>179</sup> Corriero, *supra* note 5, at 1415.

<sup>180</sup> See Roxanna Asgarian, *The Two Sides of Raise the Age in New York*, JUVENILE JUSTICE INFORMATION EXCHANGE (July 7, 2014), <http://jjie.org/the-two-sides-of-raise-the-age-in-new-york/>.

<sup>181</sup> JAILING JUVENILES, *supra* note 20, at 4.

<sup>182</sup> Wood, *supra* note 21, at 1453.

<sup>183</sup> *Id.* at 1450–51.

<sup>184</sup> *Id.* at 1451.

<sup>185</sup> JAILING JUVENILES, *supra* note 20, at 4.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

victims to sexually transmitted infections, such as HIV/AIDS and hepatitis.<sup>188</sup> In the United States, HIV and AIDS rates are five times higher among the prison population.<sup>189</sup>

To protect teens from adult inmates, prison staff often resort to housing teens in solitary confinement.<sup>190</sup> Though this measure eliminates the physical and emotional harms that result from teen contact with adult inmates, prolonged isolation merely substitutes one harm for another. “Even limited exposure to [solitary confinement] can cause anxiety, paranoia, exacerbate existing mental disorders, and increase risk of suicide.”<sup>191</sup> Juveniles incarcerated in adult jails are thirty-six times more likely to commit suicide than juveniles in a juvenile detention facility.<sup>192</sup>

Teens incarcerated with adults are also susceptible to criminal socialization, by which they develop familiarity and comfort with criminal behavior and networks.<sup>193</sup> To assimilate into inmate culture and mask their vulnerability, incarcerated teens may engage in violent behavior.<sup>194</sup> Juveniles incarcerated in adult facilities are “more likely to learn social rules and norms that legitimate[] domination, exploitation, and retaliation.”<sup>195</sup> Incarceration with adult offenders facilitates a criminal education, where teens learn techniques for performing criminal acts and avoiding detection.<sup>196</sup> As a result, this socialization can transform a juvenile into a career criminal.<sup>197</sup> Given the scientific research demonstrating juvenile malleability and capacity for positive growth,<sup>198</sup> the criminal socialization of juveniles is all the more tragic.

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> JAILING JUVENILES, *supra* note 20, at 4.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Wood, *supra* note 21, at 1450.

<sup>194</sup> *Id.* at 1451, 1456.

<sup>195</sup> Joseph, *supra* note 30, at 230 (quoting Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE 237, 263 (Jeffrey Fagan & Franklin Zimring eds., 2000)).

<sup>196</sup> Wood, *supra* note 21, at 1455–56.

<sup>197</sup> *See id.*

<sup>198</sup> *Get the Facts*, *supra* note 6.

While juvenile detention facilities offer rehabilitative and educational programs to support detainees, adult facilities have limited access to age-appropriate mental health, physical health, and educational services.<sup>199</sup> Adult facilities, which are not designed for juvenile care, “may fail to provide juveniles with the appropriate nutrition or dental and vision care, which are especially critical for developing adolescents.”<sup>200</sup> In addition, most incarcerated juveniles have not completed their high school education, and imprisonment in an adult facility limits their ability to do so.<sup>201</sup> A Bureau of Justice Assistance survey found that forty percent of adult jails provided no education services and only eleven percent provided special education services.<sup>202</sup> In contrast, the Department of Justice’s 2010 Juvenile Residential Facility Census reported that ninety-two percent of juvenile facilities offered educational services to some or all residents.<sup>203</sup>

## 2. Adult Sentencing of Juveniles Neither Reduces Juvenile Crime Rates Nor Prevents Recidivism

Studies assessing the deterrent effect of prosecuting juveniles as adults conclude that the threat of adult sanctions has no deterrent effect on juvenile crime.<sup>204</sup> One study assessed the effect of New York’s Juvenile Offender Law on juvenile crime rates by analyzing the number of juvenile arrests that occurred during the four years preceding the legislation and six years subsequent to it.<sup>205</sup> The researchers compared New York juvenile crime rates to the rates of two control groups, which included Philadelphia youth

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<sup>199</sup> Wood, *supra* note 21, at 1454–55.

<sup>200</sup> *Id.* at 1455.

<sup>201</sup> *Id.* at 1454–55.

<sup>202</sup> JAILING JUVENILES, *supra* note 20, at 4.

<sup>203</sup> SARAH HOCKENBERRY ET AL., JUVENILE RESIDENTIAL FACILITY CENSUS, 2010: SELECTED FINDINGS, NATIONAL REPORT SERIES 1 (2013), available at <http://www.ojjdp.gov/pubs/241134.pdf>.

<sup>204</sup> See Anthonsen, *supra* note 146, at 741–42.

<sup>205</sup> *Id.* at 741 (discussing Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW & SOC’Y REV. 521, 521–35 (1998)).

offenders and older New York offenders.<sup>206</sup> They concluded “that the threat or use of adult criminal sentencing had no effect on the levels of serious juvenile crime.”<sup>207</sup> A second study, evaluating the deterrent effect of Idaho’s 1981 juvenile transfer statute, reached the same conclusion.<sup>208</sup> Researchers compared juvenile arrest rates during the five years preceding the legislation and five years subsequent to it, concluding the legislation had no deterrent effect on juvenile crime.<sup>209</sup>

A third study assessed the effect of New York’s Juvenile Offender Law on juvenile recidivism.<sup>210</sup> The study analyzed the recidivism rates of 800 fifteen- and sixteen-year-olds.<sup>211</sup> The sample set included 400 juvenile robbery offenders and 400 juvenile burglary offenders, selected from two New Jersey counties and two New York counties.<sup>212</sup> In accordance with the New York Juvenile Offender Law, the New York juvenile cases originated in criminal court.<sup>213</sup> In contrast, the New Jersey juvenile cases originated in the juvenile justice system, with the option for waiver to adult criminal court.<sup>214</sup> The study concluded that both conviction rates and sanction severity were higher for juveniles in the criminal court system.<sup>215</sup> For burglary offenders, court jurisdiction did not affect the recidivism rate.<sup>216</sup> For robbery,

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 741 (discussing Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96, 96–104).

<sup>209</sup> Anthonsen, *supra* note 146, at 741 (discussing Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96, 96–104 (1994)).

<sup>210</sup> Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL’Y 77, 84 (1996).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* County selection was based on census and crime data, to ensure “the counties differed by no more than 10% on key crime or socioeconomic indicators.” *Id.* at 86.

<sup>213</sup> *Id.* at 86.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 100.

<sup>216</sup> *Id.* at 93.

however, offenders processed in criminal court had re-arrest rates fifty percent higher than offenders processed in juvenile court.<sup>217</sup> This increased recidivism rate suggests that public safety was compromised, rather than promoted, by the criminal court adjudication of juveniles.<sup>218</sup> The outcomes of these studies suggest that charging New York's juveniles as adults does not reduce recidivism and thus the "subjection of the youthful criminal to 'just desserts' is merely a placebo for the public's fear."<sup>219</sup>

### 3. Adult Sentencing Inhibits Successful Reintegration Into Society

Adolescents prosecuted as adults retain a criminal record, which can cripple their education, employment, and housing opportunities.<sup>220</sup> As a result of these impediments to reintegration, adolescents processed in criminal court continue "cycling back through the [criminal justice] system."<sup>221</sup>

As discussed in Parts II and III, juveniles incarcerated in adult facilities face educational barriers, which hinder their ability to complete high school or obtain a GED.<sup>222</sup> After incarceration, only one-third of young adults in New York complete their education.<sup>223</sup> Without a high school diploma, these juveniles are more likely to be unemployed and require public assistance.<sup>224</sup> For those juveniles who complete high school, opportunities for higher education are diminished due to their criminal history.<sup>225</sup> According to a recent survey, "66% percent of the responding colleges collect criminal justice information."<sup>226</sup> Juveniles

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 100.

<sup>219</sup> Charles & Zuccarelli, *supra* note 1, at 744.

<sup>220</sup> Corriero, *supra* note 5, at 1419.

<sup>221</sup> See Asgarian, *supra* note 180.

<sup>222</sup> See Wood, *supra* note 21, at 1454–55.

<sup>223</sup> Press Release, N.Y. State Sen. Velmanette Montgomery, *Raise the Age!* (Aug. 20, 2013), available at <http://www.nysenate.gov/press-release/raise-age>.

<sup>224</sup> *Id.*

<sup>225</sup> Corriero, *supra* note 5, at 1420.

<sup>226</sup> MARSHA WEISSMAN ET AL., CTR. FOR COMMUNITY ALTERNATIVES,

convicted as adults maintain a criminal record, and thus are required to disclose their criminal history to interested colleges.<sup>227</sup> In addition, college financing for these juveniles is almost impossible given that prospective students with a criminal conviction have limited access to federal student aid loans.<sup>228</sup>

Juveniles with criminal records also face impediments to securing both private and public housing. In New York, property owners may decline an application due to the applicant's criminal record.<sup>229</sup> Moreover, the New York City Housing Authority screens all applicants over sixteen for a criminal record—a policy that gravely impacts a youth offender's family.<sup>230</sup> “The family is deemed ineligible for public housing for prescribed periods of time after the convicted person has served his/her sentence,” which includes probation, parole, and/or payment of a fine.<sup>231</sup> The period of ineligibility is determined based upon the severity of the underlying offense.<sup>232</sup> A person convicted of a Class B misdemeanor is ineligible for public housing for three years after completing probation or parole.<sup>233</sup> This three-year housing sanction for misdemeanor offenders is comparatively severe, considering the maximum sentence of imprisonment for any misdemeanor is only one year.<sup>234</sup> A person convicted of a Class A, B, or C felony is ineligible for public housing for six years.<sup>235</sup>

In addition to the physical barriers noted above, juveniles who are sentenced as adults may suffer psychological consequences that delay their reintegration post-incarceration. Research has identified “desistance from crime with adult maturation,” which juveniles

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THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS RECONSIDERED 8 (2010), *available at* <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>.

<sup>227</sup> Corriero, *supra* note 5, at 1420.

<sup>228</sup> *Who Gets Aid*, FEDERAL STUDENT AID, <https://studentaid.ed.gov/eligibility> (last visited Feb. 20, 2015).

<sup>229</sup> Corriero, *supra* note 5, at 1421.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 1421–22 (internal quotation marks omitted).

<sup>232</sup> *Id.* at 1422.

<sup>233</sup> *Id.*

<sup>234</sup> N.Y. PENAL LAW § 70.15 (McKinney 2014).

<sup>235</sup> Corriero, *supra* note 5, at 1422.

achieve in part by “engaging in age-appropriate behavior.”<sup>236</sup> In essence, in order to grow-out of their criminal activity, juveniles need the opportunity to grow-up with their age cohort.<sup>237</sup> Juveniles sentenced as adults experience disrupted education and employment.<sup>238</sup> Thus, “juveniles punished as adults are behind their age cohort in meeting the adulthood markers of marriage, full-time employment, school completion, and independent residency.”<sup>239</sup>

#### IV. PROPOSED CHANGES TO NEW YORK’S JUVENILE JUSTICE SYSTEM

##### *A. Youth Court Pilot Program and Senate Bill 7394*

In 2012, New York Chief Judge Jonathan Lippman instituted a youth court pilot program, which created “nine adolescent diversion parts” across New York State, and “promote[s] non-criminal dispositions for 16- and 17-year-olds, including social service interventions and community service, which could earn a dismissal of charges.”<sup>240</sup> Instituting this program required no legislative action, instead building upon youth diversion programs already established in certain local courts.<sup>241</sup>

Non-violent sixteen- and seventeen-year-old offenders are eligible for participation in the pilot program.<sup>242</sup> First, teens are scheduled to meet with a probation officer for an adjustment eligibility evaluation.<sup>243</sup> During this evaluation, the probation officer establishes conditions for adjustment, such as restitution and/or participation in a community service program.<sup>244</sup> If the teen

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<sup>236</sup> Anthonsen, *supra* note 146, at 745–46.

<sup>237</sup> *Id.* at 746.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Alysia Santo, *To Judge Kids as Kids*, TIMES-UNION, Sep. 24, 2012, <http://www.timesunion.com/local/article/To-judge-kids-as-kids-3888127.php> (internal quotation marks omitted).

<sup>241</sup> Joseph, *supra* note 30, at 235.

<sup>242</sup> Santo, *supra* note 240.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*



complies with the mandated conditions, criminal charges will not be filed.<sup>245</sup> If, however, the teen fails to meet the mandated requirements, he will appear before a judge trained in adolescent behavior.<sup>246</sup>

Where adjustment is either not offered or is unsuccessful, the juvenile's case proceeds to arraignment and adjudication.<sup>247</sup> Benefits of the youth court include additional rights not available in family court, such as bail and trial by jury.<sup>248</sup> Once a verdict is reached, the youth court judge has discretion "to craft the 'least restrictive' available disposition consistent with the 'needs and best interests' of the youth[] and the 'need for protection of the community'—a more lenient standard than that for adults under the Penal Law."<sup>249</sup>

Though the youth court pilot program is a progressive step in dismantling New York's outdated juvenile justice system, the protection it affords extends only to juveniles accused of non-violent crimes.<sup>250</sup> Therefore, juveniles who commit violent crimes and are arguably most in need of youth court's rehabilitative opportunities are unable to reap its benefits. Children are unfinished products, capable of positive change—"the immaturity and plasticity that create an increased propensity for wrongdoing in adolescents also provide an enormous capacity for learning, development, and growth."<sup>251</sup> A juvenile's offense, no matter how egregious, does not limit this capacity for growth. Given juvenile malleability, they deserve every opportunity for rehabilitation.

The youth court pilot program serves as a "testing ground" for Judge Lippman's legislative proposal and provides a mechanism for immediately addressing the juvenile justice system's defects

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Jeff Storey, *Judge Would Wear Two Hats in Proposed Youth Court*, N.Y. L.J., Mar. 2, 2012, at 2.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Santo, *supra* note 240.

<sup>251</sup> Taylor-Thompson, *supra* note 102, at 186 (quoting Brief of J. Lawrence Aber et al. as Amicus Curiae Supporting Petitioners at 10–11, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos.10-9646, 10-9647)).

until new legislation is approved.<sup>252</sup> New York State Senator Steve Saland presented Judge Lippman's legislative proposal to the New York State Legislature as Senate Bill 7394 (2012).<sup>253</sup> In addition to creating the youth court pilot program, the bill proposed changes to the Criminal Procedure Law, the Penal Law, the Executive Law, and the Judiciary Law.<sup>254</sup> It proposed revising the Criminal Procedure Law to include a section devoted to sixteen- and seventeen-year-old offenders.<sup>255</sup> This section required a myriad of procedural safeguards, such as parental notification at arrest, release of the adolescent offender into a guardian's custody, and prohibition against releasing the adolescent's fingerprints to a federal depository.<sup>256</sup> In addition to amending the Criminal Procedure Law, Senate Bill 7394 revised Penal Law section 30.00 by raising the age of criminal responsibility to eighteen years old.<sup>257</sup>

Senate Bill 7394 was referred to the Codes Committee of the New York State Senate, after which the bill failed to progress further.<sup>258</sup> The Bill was reintroduced in the 2013 session as Senate Bill 4489 and again was referred to the Codes Committee.<sup>259</sup> At this time, no further movement has occurred.<sup>260</sup> Though there is no definitive explanation for the failure of these bills to progress,<sup>261</sup> counties and various state departments expressed concern over increased costs.<sup>262</sup>

### *B. Senate Bill 7020*

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<sup>252</sup> Joseph, *supra* note 30, at 235–36.

<sup>253</sup> *Id.* at 231–32.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 232.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 234.

<sup>258</sup> *Id.*

<sup>259</sup> Joseph, *supra* note 30, at 234; Bill S4489-2013, OPEN LEGISLATION, <http://open.nysenate.gov/legislation/bill/S4489-2013> (last visited Feb. 20, 2015).

<sup>260</sup> Bill S4489-2013, OPEN LEGISLATION, <http://open.nysenate.gov/legislation/bill/S4489-2013> (last visited Feb. 20, 2015).

<sup>261</sup> Joseph, *supra* note 30, at 239 n.136.

<sup>262</sup> *Id.* at 239.

In a separate attempt to raise the age of criminality in New York, Senator Velmanette Montgomery introduced Senate Bill 7020 during the 2012 session.<sup>263</sup> Senate Bill 7020 proposed raising the age of criminal responsibility to eighteen years old, permitting juvenile detention centers to house all adolescents under eighteen, and raising the maximum age for Youthful Offender Status from nineteen to twenty years old.<sup>264</sup>

One important feature of Senate Bill 7020 is that it made no distinction between violent and non-violent juveniles.<sup>265</sup> Senate Bill 7020 authorized family court to adjudicate violent felony cases involving sixteen- and seventeen-year-olds.<sup>266</sup> Though criminal court retained original jurisdiction over juveniles charged with designated felonies, the court could remove these cases to family court without authorization by the district attorney.<sup>267</sup> Senate Bills 7020 and 7394 ultimately faced the same fate—referral to the Codes Committee where all progress ceased.<sup>268</sup> Senate Bill 7020 was re-introduced in the 2013 legislative session as Senate Bill 1409, where it was again referred to the Codes Committee.<sup>269</sup>

### *C. Governor's Commission on Youth, Public Safety, and Justice's Proposal*

On April 9, 2014, Governor Cuomo issued Executive Order 131 establishing the Commission on Youth, Public Safety, and Justice.<sup>270</sup> The Commission was tasked to “(a) develop a plan to raise the age of juvenile jurisdiction, and (b) make [a] recommendation as to how New York’s justice system can improve outcomes for youth while promoting community

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<sup>263</sup> *Id.* at 236.

<sup>264</sup> S.B. 7020, 235th Leg., Reg. Sess. (N.Y. 2012); Joseph, *supra* note 30, at 237–38.

<sup>265</sup> Joseph, *supra* note 30, at 237.

<sup>266</sup> *Id.* at 238.

<sup>267</sup> *Id.* at 238–39.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 236 n.120.

<sup>270</sup> GOV.’S COMM’N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at I.

safety.”<sup>271</sup> On January 19, 2015, the Commission released its comprehensive 163-page report.<sup>272</sup> A non-exhaustive list of the report’s topics includes: the evolution of juvenile reform in New York State; best practices in juvenile justice; the upper and lower ages of delinquency jurisdiction across the United States; recent reforms raising the age of criminal responsibility in other states; arrest and diversion processes; court processes for sixteen- and seventeen-year-olds and younger offenders; pretrial and post-trial confinement of juveniles; harms of incarcerating juveniles in adult facilities; juvenile disposition services and facilities; juvenile re-entry post-incarceration; the consequences for juveniles with a criminal record; and the projected impact on case processing if New York were to raise the age of the criminal responsibility.<sup>273</sup>

In addition to summarizing and analyzing juvenile justice processes, the report puts forth thirty-eight procedural and legislative recommendations for reform.<sup>274</sup> Consistent with the proposals discussed above, the report recommends raising the age of juvenile jurisdiction to eighteen.<sup>275</sup> The report recommends raising the lower threshold of juvenile jurisdiction to age twelve, excluding homicide offenses.<sup>276</sup> The recommended lower age threshold for juvenile homicide offenders is ten years old.<sup>277</sup> The report also recommends expanding family court jurisdiction to sixteen- and seventeen-year-olds charged with non-violent felonies, disorderly conduct violations, misdemeanors, and

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<sup>271</sup> *Id.*

<sup>272</sup> David Seifman, *Juvi-justice Panel Wants Criminal Responsibility Age Raised To 18*, N.Y. POST, Jan. 20, 2015, <http://nypost.com/2015/01/20/juvi-justice-panel-wants-criminal-responsibility-age-raised-to-18/>.

<sup>273</sup> GOV.’S COMM’N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at V–IX.

<sup>274</sup> *Id.* at 150–53. The Commission’s report provides a variety of progressive recommendations beyond the scope of this Note regarding interrogation practices, orders of protection, sealing provisions, diversion services, residential facility placement, re-entry services, sentencing guidelines, and methods to reduce recidivism. *Id.*

<sup>275</sup> *Id.* at 150.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

harassment.<sup>278</sup> Under this scheme, the criminal court system would retain original jurisdiction over “current Juvenile Offender crimes, as well as all violent felony offenses; all homicide offenses; Class A felonies; crimes of terrorism; felony vehicular assaults; aggravated criminal contempt; and conspiracy to commit any of these offenses and tampering with a witness related to any of these offenses.”<sup>279</sup>

The report also recommends creating youth parts within the criminal court system.<sup>280</sup> However, unlike Judge Lippman’s youth court proposal, these youth parts would have jurisdiction over *all* sixteen- and seventeen-year-old offenders, as well as younger offenders designated as Juvenile Offenders.<sup>281</sup> Given that this proposal mandates family court adjudication for certain sixteen- and seventeen-year-old offenders and criminal court adjudication for other sixteen- and seventeen-year-old offenders, the specially trained youth part judges would be vested with concurrent criminal court and family court jurisdiction.<sup>282</sup> In addition, the Commission recommends extending Youthful Offender status to nineteen and twenty-year-olds (currently Youthful Offender eligibility is limited to juveniles under nineteen years old).<sup>283</sup> Finally, regardless of family court or criminal court jurisdiction, the proposed reform prohibits confinement of any juvenile in an adult jail or prison and permits juveniles to remain in youth facilities until age twenty-one.<sup>284</sup> This particular recommendation is extremely progressive, and reflects the documentation of the harms suffered by juveniles in adult facilities.

The Commission’s reforms are arguably the most progressive in the nation, extending family court protections to a larger age cohort and a more expansive list of offenses.<sup>285</sup> Following the

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<sup>278</sup> *Id.* at 151.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 152.

<sup>284</sup> *Id.* at 151.

<sup>285</sup> *See id.* at 150–53.

report's release, New York State Bar President Glenn Lau-Kee voiced the association's support for raising the age of criminal responsibility:

Every child accused of a nonviolent felony deserves a second chance . . . . Research demonstrates—what parents intuitively know—that 16 and 17-year-old kids lack the maturity and judgment to understand the legal consequences of their actions. A criminal record at a young age can shadow a lifetime, affecting an individual's future education and employment. Raising the age of criminal responsibility will help all children to embark on a more positive path to adulthood. Providing troubled teenagers with support and guidance can help them turn around their lives.<sup>286</sup>

Lau-Kee's statement echoes the underlying tenor of the Commission's recommendations, and contains the same contradiction as well. Lau-Kee states that juveniles lack judgment to appreciate the legal consequences of their actions and discusses how the burden of a criminal record prevents juveniles from breaking the criminal mold.<sup>287</sup> In making these particular statements, Lee-Kau includes no qualifiers—he speaks of all children.<sup>288</sup> Yet, when he discusses which juveniles should benefit from the proposed reforms, he limits his scope to children accused of nonviolent felonies.<sup>289</sup> While the proposed reforms are a critical step toward providing juveniles access to crucial rehabilitative opportunities and assisting juveniles in successful re-entry post-incarceration,<sup>290</sup> juveniles who commit the most egregious of offenses are denied access to these benefits.

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<sup>286</sup> Denise M. Champagne, *Judiciary Urged To Keep Its Budget Under Caps*, THE DAILY RECORD, Jan. 22, 2015, <http://nydailyrecord.com/blog/2015/01/22/judiciary-urged-to-keep-its-budget-under-cap/>.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> See GOV.'S COMM'N RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM, *supra* note 22, at 150.

## V. RECOMMENDATIONS

This Note's proposal is comprised of four parts.<sup>291</sup> First, the age of criminality in New York should be raised from sixteen to eighteen years old. Second, New York should establish a separate youth court to adjudicate all cases involving sixteen- and seventeen-year-olds, and all designated felonies committed by thirteen-, fourteen-, and fifteen-year-olds. Third, New York should eliminate any provisions permitting the transfer of juveniles from family court to adult criminal court. Finally, district attorneys should have discretion to permit reverse waiver from criminal court to youth court for select cases involving eighteen- to twenty-one-year-olds.

First, the New York State Legislature should amend the Family Court Act to increase the age of criminal responsibility from sixteen to eighteen years old.<sup>292</sup> Research demonstrates that the adolescent brain is underdeveloped, which limits adolescent capacity for decision making, impulse control, and reasoning. This research suggests that adolescent offenders are less culpable than their adult counterparts, and that their youth should therefore be considered in the adjudication process. In addition, this research

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<sup>291</sup> For the purpose of this Note, I do not take into account the potential budgetary and political barriers to implementing this juvenile reform.

<sup>292</sup> This Note recognizes that setting the age of criminal responsibility at eighteen merely creates another arbitrary delineation, as research demonstrates brain development continues until at least age twenty-four. However, age eighteen appears to be the best practice in most states. See Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH. L. REV. 103, 129 (2013). Professor Adam J. Kolber examines the "hard-to-justify discontinuities" that occur when the law requires line drawing across a spectrum of conduct. Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655, 655 (2014). Kolber describes the advantages of "smooth laws," where a gradual change in legal input produces a gradual change in legal output, over "bumpy laws," where a gradual change in legal input produces a stark change in legal output. *Id.* at 657. Discussing the Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), Kolber characterizes the age of legal responsibility as "bumpy," noting that "those who murder on their eighteenth birthday can potentially be executed while those who murder the day before cannot." Kolber, *supra*, at 681 n.62.

demonstrates that adolescent brains are still developing and thus are receptive to rehabilitative interventions. Raising the age of criminal responsibility is the first step in reclaiming New York's lost youth.

Second, within the family court system, the New York State Legislature should designate a separate youth court tasked with adjudicating offenses committed by (1) all sixteen- and seventeen-year-olds, and (2) all thirteen-, fourteen-, and fifteen-year-old designated felony offenders. Family court provisions—including adjustment, sealing, and sentencing that considers both the best interests of the child and the community—would be extended to youth court. This youth court would have jurisdiction over these cohorts, regardless of offense severity. Though sixteen- and seventeen-year-olds are juveniles, their cognitive abilities are generally more developed than younger offenders, making their criminal culpability less than adults' but greater than younger offenders'.<sup>293</sup> These juveniles should be prosecuted in a court designed to recognize their education, psychological maturity, mental health, and family life. In addition, this youth court would have original jurisdiction over thirteen-, fourteen-, and fifteen-year-olds who commit designated felony acts. Youth court is the appropriate venue for these young offenders because of its more stringent sentencing capabilities, discussed below, and greater familiarity with violent offenses.

Youth court sentencing guidelines should include more stringent measures than those available to family court judges.<sup>294</sup> This would account for the increased age of offenders and the increased severity of offenses. Youth court judges would appropriately consider the adolescents' mental development and culpability in determining the sentence. In addition, any sentence requiring incapacitation would be served in a secure juvenile facility rather than an adult prison. If a juvenile is sentenced to a

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<sup>293</sup> See Taylor-Thompson, *supra* note 102, at 186 (discussing the underdeveloped cognitive abilities of younger adolescents, such as fourteen- and fifteen-year-olds, in comparison to older adolescents, such as seventeen-year-olds).

<sup>294</sup> For a proposal recommending increased sentencing power of family court judges, rather than youth court judges, see Hummel, *supra* note 36, at 283–84.



prison term that extends beyond his twenty-first birthday, the remainder of his sentence would be served in an adult facility. Though family court is not the appropriate venue for these adolescent offenders, neither is adult criminal court. Youth court's ability to impose strict sentences would assuage "public critique that juvenile courts are too lenient"<sup>295</sup> while ensuring that adolescents are adjudicated in a court developed specifically for their age group.

Third, the New York State Legislature should eliminate transfer from family court to criminal court, in order to ensure that family court or youth court retains jurisdiction over all juveniles.<sup>296</sup> Both family court and youth court conduct a holistic assessment of the youth and his offense, and then determine the least restrictive disposition available consistent with society's needs and the offender's needs.<sup>297</sup> Criminal court does not have this discretion. As a result of criminal court adjudication, adolescents are incarcerated in adult facilities with limited access to age-appropriate mental health, physical health, and educational services.<sup>298</sup> Adolescents in adult facilities are at greater risk for sexual victimization and suicide.<sup>299</sup> After their incarceration, these adolescent offenders face significant barriers to education, employment, and housing.<sup>300</sup> Moreover, research suggests that adult sanctions neither deter youth offenders nor decrease recidivism.<sup>301</sup> For these reasons, the New York State Legislature should eliminate transfer provisions from family court to criminal court.

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<sup>295</sup> *Id.* at 284.

<sup>296</sup> For a detailed analysis of juvenile justice policy and a proposal recommending a bright-line rule prohibiting all adult prosecution of adolescents, see Taylor-Thompson, *supra* note 102, at 184–90.

<sup>297</sup> N.Y. FAM. CT. ACT § 352.2 (McKinney 2014).

<sup>298</sup> Wood, *supra* note 21, at 1454.

<sup>299</sup> JAILING JUVENILES, *supra* note 20, at 4.

<sup>300</sup> Corriero, *supra* note 5, at 1419–22.

<sup>301</sup> Anthonsen, *supra* note 146, at 741 (discussing Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 Law & Soc'y Rev. 521, 522 (1998)); Fagan, *supra* note 211, at 93.

Fourth, the legislature should permit waiver to youth court for select eighteen- to twenty-one-year-olds.<sup>302</sup> Scientific research suggests that brain development continues until at least age twenty-four.<sup>303</sup> Unavoidably, the age delineation in youth court's original jurisdiction is somewhat arbitrary—a person does not wake up on his eighteenth birthday endowed with significantly more knowledge, impulse control, and reasoning than he had the day prior. Further, raising the age of criminality to eighteen is in accordance with best practice across the United States.<sup>304</sup> However, given the robust scientific research finding limitations in eighteen- to twenty-one-year-olds' impulse control and reasoning skills, a district attorney or judge should have discretion to suggest removal in appropriate cases. The district attorney would likely utilize this discretion if the offender only recently turned eighteen or if the offender exhibited developmental delays suggesting his maturity level more closely matched that of a younger age cohort.

#### CONCLUSION

Gabrielle Horowitz-Prisco, Director of the Juvenile Justice Project at the Corrections Association, stresses that “no one is solely the worst thing they have ever done.”<sup>305</sup> Though one person may not be solely his worst act, New York's paradigm entrenches the state's youngest offenders in a correctional system designed to ensure that their first worst act is not their last. Sixteen- and seventeen-year-olds face an uphill battle to overcome their juvenile offenses.

Juvenile brains are underdeveloped in regions associated with risk assessment, impulse control, and reasoning, and these regions continue to mature into early adulthood.<sup>306</sup> This research

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<sup>302</sup> For a proposal recommending the extension of family court jurisdiction to age twenty-five, see Hummel, *supra* note 36, at 284.

<sup>303</sup> Slobogin, *supra* note 292, at 129.

<sup>304</sup> *Id.*

<sup>305</sup> Amelia Pang, *This Is New York: Gabrielle Horowitz-Prisco, Director of Juvenile Justice Project on Protecting Children*, EPOCH TIMES (Aug. 30, 2014), <http://www.theepochtimes.com/n3/923273-this-is-new-york-gabrielle-horowitz-prisco-director-of-juvenile-justice-project-on-protecting-children/print.php>.

<sup>306</sup> AMA Brief, *supra* note 26, at \*2, 16.

demonstrates that juveniles are both less culpable than adults and more receptive to rehabilitative intervention.<sup>307</sup> Juveniles should be processed in a court that accounts for their diminished culpability and capitalizes on their potential for positive growth. Moreover, juvenile capacity for rehabilitation is squandered by juvenile incarceration in adult facilities. Juveniles incarcerated in adult prisons and jails have limited access to educational and rehabilitative programs,<sup>308</sup> and are at high risk for sexual victimization, emotional abuse, depression, and criminal socialization.<sup>309</sup> In addition, the adult prosecution of juveniles has no deterrent effect on juvenile crime rates and juveniles prosecuted as adults are more likely to re-offend than juveniles prosecuted in family court.<sup>310</sup> This re-offending rate is unsurprising, given that a criminal record severely limits one's housing, education, and employment opportunities.<sup>311</sup>

Proposed legislation, the youth court pilot program, and recommendations from the Governor's Commission are progressive steps toward dismantling New York's outdated juvenile justice system, but they fall short by denying assistance to New York's most troubled juveniles. New York is prosecuting and incarcerating juveniles at a time in their lives when they are most responsive to rehabilitative intervention, and losing a precious opportunity to turn troubled teens into productive members of society. It is time for New York to raise the age of criminal responsibility and embrace rehabilitative intervention for all youth, regardless of the offense. Investing in New York's juveniles is an investment in the future. Sixteen is too young, and our resources too vast, to concede hopelessness just yet.

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<sup>307</sup> See *Get the Facts*, *supra* note 6.

<sup>308</sup> Wood, *supra* note 21, at 1455.

<sup>309</sup> Wood, *supra* note 21, at 1450–51; JAILING JUVENILES, *supra* note 20, at 4.

<sup>310</sup> See Anthonsen, *supra* note 146, at 741–42.

<sup>311</sup> Corriero, *supra* note 5, at 1419–22.